

European Insolvency Regulation

6. The COMI in CJEU judgments

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Cases

- ▶ Staubitz–Schreiber – Case C–1 / 04, judgment of 17 January 2006
- ▶ Eurofood – Case C–341 / 04, judgment of 2 May 2006
- ▶ Interedil – Case C–396 / 09, judgment of 20 October 2011
- ▶ MH and NI v OJ and Novo Banco SA – Case C–253 / 19, judgment of 16 July 2020

Staubitz–Schreiber – background

- ▶ debtor: Susanne Staubitz–Schreiber – a natural person, German national, previously operated a business
- ▶ on 6.12.2001 applied for insolvency in Germany. At that time she was resident in Germany.
- ▶ on 1.4.2002 moved to Spain
- ▶ 10.4.2002 – German court refuses to open proceedings because of insufficient assets to cover the costs
- ▶ 14.8.2002, 15.10.2002 – on appeal the German court finds that the debtor’s COMI is in Spain → lack of jurisdiction of German courts
- ▶ further appeal to the Bundesgerichtshof (German Supreme Court), BGH refers to the ECJ

Staubitz–Schreiber – issue

- ▶ What point in time is relevant for the assessment of the jurisdiction? After the request to open proceedings is lodged, do subsequent changes of COMI affect the jurisdiction?
- ▶ Answer: transfer of COMI to another Member State after the request is lodged does not exclude the jurisdiction of the court where the request was lodged → jurisdiction established at the time of lodging of the request is retained → *perpetuatio fori*

Justification – to avoid forum shopping

Eurofood – background

- ▶ debtor: Eurofood IFSC Ltd
 - a company registered in Ireland
 - a fully owned subsidiary of Parmalat SpA (Italy)
 - a specific purpose within a holding structure (no business on its own)
 - actual presence in Ireland
 - economic choices controlled by the parent company in Italy

Eurofood – insolvency proceedings

- ▶ 23.12.2003 (IT) – *amministrazione straordinaria* against Parmalat SpA (parent company), Mr Bondi appointed as administrator
- ▶ 27.1.2004 (IRL) – application for compulsory winding-up of Eurofood, provisional liquidator appointed
- ▶ 9.2.2004 (IT) – *amministrazione straordinaria* against Eurofood, Mr Bondi as administrator
→ a clear effort to consolidate insolvency proceedings within a group of companies

Eurofood – insolvency proceedings

- ▶ 10.2.2004 (IT) – application for declaration of insolvency, hearing fixed for 17.2, Irish liquidator informed 4 days in advance
- ▶ 20.2.2004 (IT) – the Italian court assumes international jurisdiction (COMI in Italy)
- ▶ 23.3.2004 (IRL) – order for winding-up, with retroactive effect from 27.1.2004
 - COMI in Ireland
 - Italian proceedings not recognized under Art. 26 of the old EIR [Art. 33 EIR]
- ▶ appeal of the Italian administrator → Irish Supreme Court refers to the ECJ

First issue (question 4) – COMI

- ▶ group of companies – jurisdiction to be examined separately for each debtor constituting a distinct legal entity
 - ▶ COMI to be assessed according to criteria being both objective and ascertainable by third parties
 - ▶ „letterbox” company – presumption in favour of the registered office may be rebutted
 - ▶ actual carrying out of a business in the Member State where the registered office is situated – mere control of economic choices by parent company in another Member State is not enough to rebut the presumption
- Eurofood: COMI rather in Ireland (but not stated clearly)

Second issue (question 3) – grabbing jurisdiction

- ▶ Can jurisdiction assumed by a court be reviewed by a court of another Member State?
- ▶ Art. 16(1) of the old EIR [Art. 19(1) EIR] – automatic recognition → rule of priority based on mutual trust
- ▶ examination of jurisdiction needs to comply with guarantees of fair legal process
- ▶ such decision on jurisdiction may not be reviewed by courts of other Member States (cf. recital 22 to the old EIR [recital 65 to the EIR])
- ▶ appeal according to national law is the only way to challenge the decision on jurisdiction

RISKS → ‘race to the court’ and forum shopping. Correct assessment of COMI may become irrelevant.

Eurofood: the court which first opened insolvency proceedings has jurisdiction

Third issue (questions 1 and 2) – when are proceedings opened?

- ▶ should it be examined according to national law?
→ should retroactive effect under Irish law be recognized?
- ▶ no, criteria of 'insolvency proceedings' according to the EIR to be taken into account → definition in Art. 1(1) + Annexes A and C [B]
- ▶ decision following an application, based on the debtor's insolvency, seeking the opening of proceedings listed in Annex A, where that decision involves divestment of the debtor and appointment of a liquidator listed in Annex C [B]

Eurofood: Irish provisional liquidator was listed in Annex C → Irish insolvency proceedings under the EIR opened already on 27.1.2004

Fourth issue (question 5) – public policy clause


- ▶ when can a recognition of insolvency proceedings be refused?
- ▶ automatic recognition under Art. 16(1) old EIR [Art. 19(1) EIR] based on mutual trust
- ▶ public policy clause of Art. 26 old EIR [Art. 33 EIR] to apply only in exceptional cases → breach of fundamental principles or the constitutional rights and liberties of the individual
- ▶ example – right to fair process → right to be heard (if provided by applicable national law)

Eurofood: not relevant, as Irish court was deemed to have first opened proceedings. Right of the Irish provisional liquidator to be heard was probably infringed on by the Italian court.

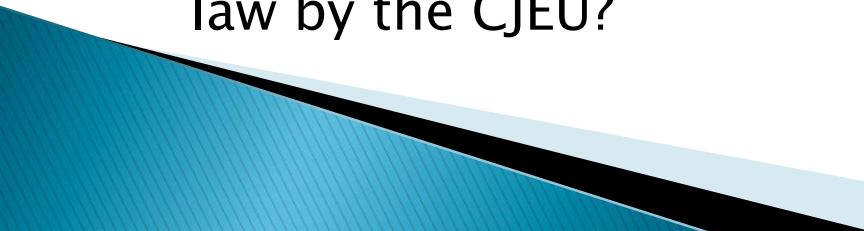
Interedil – background

- ▶ Interedil Srl was a company established under Italian law with registered office in Monopoli (Italy)
- ▶ on 18 July 2001 its registered office was transferred to London and it was registered in the UK register of companies. Subsequently, on 22 July 2002, Interedil was removed from the UK companies register, apparently in result of a takeover.
- ▶ Interedil continued to hold some immovable property in Italy, was party to a lease agreement in respect of two hotel complexes and had a contract relationship with a bank

Interedil – insolvency proceedings

- ▶ 28 October 2003 – request to the Court in Bari (IT) by a creditor to open *fallimento* proceedings against Interedil; Interedil challenges the jurisdiction of Italian courts claiming that its COMI is in the UK and requests a preliminary ruling of the Italian Supreme Court.
 - ▶ 24 May 2004 – *fallimento* proceedings opened against Interedil by the Court of Bari. Interedil appeals against this decision.
 - ▶ 20 May 2005 – Italian Supreme Court confirms the jurisdiction of the Italian courts
 - ▶ 6 July 2009 – Court of Bari stays the proceedings and refers to the CJEU for a preliminary ruling
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Interedil – questions

1. Is COMI to be interpreted according to national law or EU law? How is it defined and what are the decisive factors for its identification?
 2. When can the presumption of Art. 3(1) of the EIR be rebutted?
 3. Can immovable property, lease agreement in respect of hotel complexes and a contract with a bank point towards COMI or an establishment in a Member State?
 4. Can national procedural rules preclude the interpretation of EU law by the CJEU?
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Interedil – answers

- ▶ the term „COMI” must be given an autonomous and uniform interpretation throughout the Union, by reference to the EU law.
- ▶ more importance should be attached to the company’s central administration when establishing the COMI. The presumption of the COMI being in the place of the registered office can be rebutted if „a comprehensive assessment of all the relevant factors makes it possible to establish, in a manner that is ascertainable by third parties, that the company’s actual centre of management and supervision and of the management of its interests is located in [an]other Member State” → see recital 30 to the recast EIR

Interedil – answers

- ▶ location of the COMI at the date of request to open insolvency proceedings is relevant for the purpose of determining the jurisdiction. Change of COMI prior to the request leads to a change in jurisdiction (cf. Staubitz-Schreiber).
- ▶ *See also amendments subsequently introduced to Art. 3(1) EIR → presumptions regarding COMI do not apply if the registered office/principal place of business/habitual residence has been moved within 3/6 months prior to the request for the opening of proceedings*
- ▶ „establishment” requires a minimum level of organisation and a degree of stability necessary for pursuing an economic activity. The mere presence of goods in isolation or bank accounts does not in principle meet that definition.

Interedil – an issue beyond insolvency law

- ▶ One of the questions referred to the CJEU: Can national procedural rules preclude the interpretation of EU law by the CJEU?
- under Italian procedural law a court of lower instance was bound by the interpretation by the Italian Supreme Court, including the interpretation of the EU law
- under the EU law every court is able to refer a case to the CJEU for preliminary ruling on issues under the EU law

Answer given by the CJEU in Interedil:

- ▶ a national court is not bound by a national procedural rule under which that court is bound by the rulings of a higher national court, where it is apparent that the rulings of the higher court are at variance with EU law, as interpreted by the CJEU

Bottom line: every national court is able to refer a case of EU law to the CJEU even if it is precluded from doing so by national law.

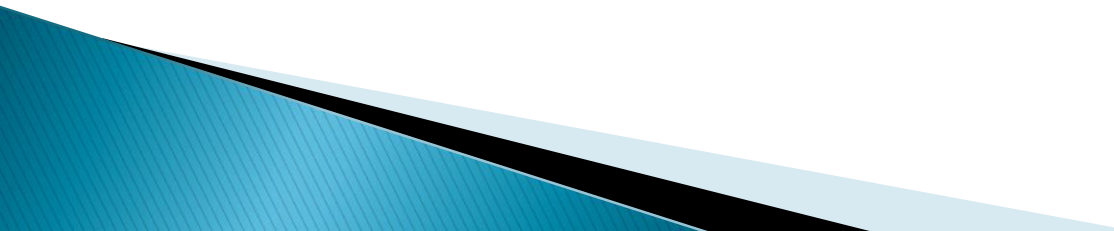
National courts are not bound by national procedural rules forcing upon them an interpretation that would be contrary to the EU law.

→ potential significance for Member States with ongoing efforts of the executive to limit the independence of the judiciary (e.g. Poland, Hungary)

Result – codification of ECJ/CJEU decisions on the COMI in the recast EIR

- ▶ An extended wording of Art. 3(1) EIR taking over most important elements of ECJ/CJEU decisions and of the Virgos–Schmit Report:
- ▶ „The courts of the Member State within the territory of which the centre of the debtor's main interests is situated shall have jurisdiction to open insolvency proceedings ("main insolvency proceedings"). The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.”

Codification of decisions on the COMI

- ▶ „In the case of a **company or legal person**, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary. That presumption shall only apply if the registered office has not been moved to another Member State within the three-month period prior to the request for the opening of insolvency proceedings.”
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Codification of decisions on the COMI

- ▶ „In the case of an individual exercising an independent business or professional activity, the centre of main interests shall be presumed to be that individual's principal place of business in the absence of proof to the contrary. That presumption shall only apply if the individual's principal place of business has not been moved to another Member State within the three-month period prior to the request for the opening of insolvency proceedings.”

Codification of decisions on the COMI

- ▶ „In the case of **any other individual** [*i.e. non-trader or consumer – MP*], the centre of main interests shall be presumed to be the place of the individual's habitual residence in the absence of proof to the contrary. This presumption shall only apply if the habitual residence has not been moved to another Member State within the six-month period prior to the request for the opening of insolvency proceedings.”

Examination of the COMI under the recast EIR

- ▶ Art. 4(1) EIR: „A court seised of a request to open insolvency proceedings shall of its own motion examine whether it has jurisdiction pursuant to Article 3. The judgment opening insolvency proceedings shall specify the grounds on which the jurisdiction of the court is based, and, in particular, whether jurisdiction is based on Article 3(1) or (2)”
- examination *ex officio* and obligation to provide justification, aimed at avoiding grabs of jurisdiction

Examination of the COMI under the recast EIR

- ▶ However, according to recital 65 (last sentence) to the EIR, „the decision of the first court to open proceedings should be recognised in the other Member States without those Member States having the power to scrutinise that court's decision.” → the court which first opened insolvency proceedings has jurisdiction, as confirmed by the ECJ in Eurofood
- ▶ Judicial review of decision of a national court on COMI → Art. 5 (1) EIR: „The debtor or any creditor may challenge before a court the decision opening main insolvency proceedings on grounds of international jurisdiction.”

Novo Banco (2020)

Case decided already under the recast EIR, before Brexit (UK was still a Member State)

- ▶ MH and NI, a married couple, were resident in the UK (habitual residence), where they were employed
- ▶ their sole immovable asset was located in Portugal
- ▶ all the transactions and all the contracts leading to their insolvency were conducted and concluded in Portugal
- ▶ there is no connection between their place of habitual residence and the events that led to their insolvency, which occurred entirely in Portugal

Novo Banco (2020)

- ▶ MH and NI applied for the opening of insolvency proceedings in Portugal
- ▶ first instance: Portuguese court declines jurisdiction, states that COMI is in the UK
- ▶ MH and NI appeal, claiming that their COMI is in Portugal
- ▶ Court of Appeal of Guimarães, Portugal, refers to the CJEU

- ▶ **Question**: does the fact that the debtor's sole immovable property is located in a Member State justify **rebutting the presumption of COMI being in another Member State, where the debtor has habitual residence** and is employed?
- ▶ Broader context: other circumstances justifying rebutting the presumption

Novo Banco (2020)

- ▶ Answer to the question:

the presumption ... according to which the COMI of an individual not exercising an independent business or professional activity is his or her habitual residence, is not rebutted solely because the only immovable property of that person is located outside the Member State of habitual residence

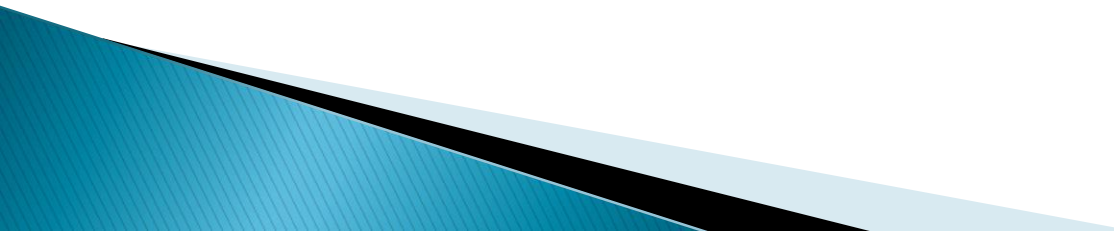
Novo Banco (2020)

Remarks on the broader context:

- ▶ the term COMI must be given an independent and uniform interpretation throughout the EU, independent of national legislation;
- ▶ emphasis on the use of objective criteria in order to ensure legal certainty and predictability as regards the determination of COMI, special consideration should be given to the creditors and to their perception, genuine connection to a Member State to be taken into account;
- ▶ overall assessment of all the objective criteria ascertainable by third parties necessary;
- ▶ relevant criteria include: place where the debtor conducts the administration of his or her economic interests or the majority of his/her revenue is earned and spent, or the place where the greater part of his/her assets is located;

Novo Banco (2020)

Remarks on the broader context, cont'd:

- ▶ the presumption of COMI in the place of the debtor's habitual residence is justified by a strong possibility that that place corresponds to the centre of his/her main economic interests;
 - ▶ the location of the debtor's assets is one of the objective criteria to be taken into consideration but not enough alone to rebut the presumption;
 - ▶ the cause of the insolvency is not, as such, a relevant factor for determining the COMI of an individual, but all objective factors, ascertainable by third parties, which are connected with that debtor's financial and economic situation should be taken into account.
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Additional reading

in Polish:

M. Porzycki, Międzynarodowe postępowanie upadłościowe – wybrane sprawy z orzecznictwa ETS i sądów krajowych, Czasopismo Kwartalne HUK 2009, nr 1, s. 99